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No. 83-1671

IN THE

Supreme Court of the United States

October Term, 1983

ORVIL T. BRASWELL AND PARLEE K. BRASWELL, ET AL.,
Petitioners,

v.

FLINTKOTE MINES, LTD., ET AL.,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

(I) Should the Petition for Certiorari be denied because Petitioners have failed to present any special or important reasons for review of the Seventh Circuit's decision below in *Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527 (7th Cir. 1983) (Plaintiffs' Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ["Petit."], Appendix pp. A1-A20)?

(II) Did the Courts below correctly decide the relevant Indiana law question by following the Indiana Supreme Court's decision in *Shideler v. Dwyer*, 418 N.E 2d 281 (Ind. 1981), to hold that Petitioners' causes of action for asbestosis accrued for purposes of Ind. Code Sec. 34-1-2-2 (Burns Code Ed., 1982 Supp.) ("IC") not later than when they were last exposed to asbestos, which in each case occurred over the statutory two years before suit was filed?

(III) Is certification appropriate (A) in view of this Court's prior ruling that it is never *required*? Further, (B) is certification appropriate here when (1) the Indiana law question presented is not novel; (2) the Indiana courts' answer to that question is neither unclear nor unsettled; and (3) Indiana law is neither distant nor unfamiliar to the Courts below? Further, is certification appropriate where, as here, (C) Petitioners chose the federal forum; (D) Petitioners' request for certification comes so late in this litigation that granting it will only cause unnecessary and unwarranted delay; (E) certification will not avoid any federal questions; and, (F) Indiana's interest in judicial economy weighs heavily against certification?

(IV) Have Petitioners' Fourteenth Amendment due process and equal protection rights been violated by Ind. Code Sec. 33-1-1.5-5 (West's Ann. Ind. Code Ed., 1983 Supp.) ("IC")—Indiana's ten-year product liability "statute of repose"—when (A) this Court has heretofore held that identical claims of Fourteenth Amendment violations do

not present a substantial federal question and has denied identical petitions for certiorari; (B) the Fourteenth Amendment does not require that personal injuries be ascertained or ascertainable before claims therefor can be barred as untimely by a state statute of limitations; (C) IC 33-1-1.5-5 rationally achieves Indiana's substantial and legitimate interests in repose and reliance; and (D) any classification created by that statute is not constitutionally impermissible but is rationally related to such Indiana policies?

(V) Does a conflict exist among the state and federal courts as to the resolution of Petitioners' claims of violations of Fourteenth Amendment due process and equal protection when all the state court cases cited by Petitioners, the only cases they cite as being contrary to the Seventh Circuit's decision below, decided only state constitutional questions?

LIST OF PARTIES

Pursuant to S.C. Rule 28.1, the parties to this proceeding are:

Orvil T. Braswell and Parlee K. Braswell,
William M. Baker and Phyllis J. Baker,
Omer T. Rogers and Opal T. Rogers,
Helen M. Igo and Boyd Melvin Igo,
Robert E. Godfrey and Thelma Godfrey,
James T. Clapp and Betty M. Clapp, and
Obert F. Moore and Gladys Moore,

Petitioners,

vs.

Flintkote Mines, Ltd., a corporation whose parent corporations are The Flintkote Company and Genstar, Inc.;

GAF Corporation, a corporation whose affiliate is GAF/Huls Chemie GmbH;

The Celotex Corporation, a corporation whose parent corporation is The Jim Walter Corporation;

Asbestos Corporation, Ltd., a corporation whose parent companies are Mines-SNA, Inc., and Societe Nationale de l'Amiante;

Bell Asbestos Mines, Ltd., a corporation whose parent corporation is Societe Nationale de l'Amiante;

National Gypsum Company, a corporation whose affiliate is Compagnie du Platre;

Raymark Industries, Inc., successor in interest to Raybestos-Manhattan, Inc. Raymark Industries, Inc., is a corporation whose parent corporation is Raymark Corporation; and

The Flintkote Company, a corporation whose parent corporation is Genstar, Inc.,

Respondents.

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STATEMENT OF THE CASE

Respondents accept Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

(I) No special or important reasons for review on writ of certiorari exist.

(II) The Courts below correctly applied Indiana law by holding that Petitioners' causes of action for asbestosis accrued under IC 34-1-2-2 not later than when they last inhaled asbestos, which in each case occurred over the statutory two years before suit was filed.

(III) Certification is inappropriate because (A) it is never *required* and (B) it is inappropriate in this case because (1) the Indiana law question presented is not novel, (2) the Indiana courts' answer to that question is neither unclear nor unsettled, and (3) Indiana law is neither distant nor unfamiliar to the Courts below. Certification is also improper because (C) Petitioners chose the federal forum, (D) Petitioners' request for certification is so late that granting it will cause unwarranted delay, (E) certification will not avoid federal questions, and (F) Indiana judicial economy weighs against certification.

(IV) Petitioners' due process and equal protection rights have not been violated by IC 33-1-1.5-5 because (A) this Court has refused to hear appeals raising identical claims of Fourteenth Amendment violations; (B) the Fourteenth Amendment does not require a discovery rule for personal injuries; (C) IC 33-1-1.5-5 rationally achieves Indiana's interests in repose and reliance, and (D) any classification created by it is constitutionally permissible.

(V) No conflict among the state and federal courts exists because Petitioners' state court cases decided only state constitutional issues.

ARGUMENT

I. Preliminary Statement: No Special or Important Reasons For Review.

The Petition does not present any "special [or] important reasons" [S.C. Rule 17.1 (28 U.S.C.A.: Rules, 1983 Pocket Part)] for review on certiorari of *Braswell v. Flintkote Mines, Ltd., supra*, (Petition, pp. ["Petit."] A1-A20).

Petitioners fail to show that "the character of [any of their stated] reasons" for granting the Writ are "special and important" to justify review under S.C. Rule 17.1. All of Petitioners' arguments, however designated, fall short of demonstrating any reason for review.

As to Rule 17.1 (a), the Seventh Circuit's application of Indiana law is not in conflict with any decision of another federal court of appeals or of the Indiana Supreme Court. See Argument, Section II, *infra*.

Erroneous is Petitioners' apparent argument under Rule 17.1(a), that, by failing to certify to the Indiana Supreme Court the question of when their causes of action "accrued" under IC 34-1-2-2, the Seventh Circuit "so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's power of supervision."

Certification of the "accrual" question is wholly unnecessary and inappropriate. See Argument, Section III, *infra*. Thus, no ground for review under Rule 17.1(a) is stated.

Nor is review required by Rule 17.1(b): the decision of which review is sought was rendered by the Seventh Circuit, not by "a state court of last resort." Further, Petitioners' state court cases (Petit. 6-7) did not decide any relevant "federal questions[s]" [S.C. Rule 17.1(b)] at all. There is thus no division among the state and federal courts under 17-1(b). See Argument, Section V, *infra*.

This Court's decisions demonstrate Petitioners' inability

to bring their Petition within Rule 17.1(c). Any federal question presented has been effectively "settled by this Court." See Argument, Section IV, *infra*. The Seventh Circuit decided all federal questions in a way *not* "in conflict with applicable decisions of this Court."

II. Indiana Law As To When A Cause Of Action Accrues Correctly Applied By Seventh Circuit.

Examination of the application of *Shideler v. Dwyer*, *supra*, by the Courts below shows to be appropriate herein the deference accorded the local "federal judge of long experience and...three circuit judges whose circuit includes" Indiana on this purely Indiana law question.[1] Petitioners contend, however, that *Shideler* does not correctly state Indiana law but that the proper statement of Indiana law is in a decision of the Indiana Court of Appeals, *Monsanto Co. v. Miller*, 455 N.E.2d 392 (Ind.App. 1983). Petit. 12. Petitioners are wrong.

In the first place, if there were any conflict between *Shideler* and *Monsanto*, the former, as a decision of the Indiana Supreme Court, would obviously control. But no such conflict exists.

The Seventh Circuit held that under

> "Indiana law, ...the causes of action herein accrued not when the injuries were discovered or susceptible of ascertainment,* but rather at the time of the wrongful act, which the trial court reasonably concluded to be no later than the most recent exposure to asbestos fiber." *Braswell*, *supra*, 723 F.2d at 532 (footnote omitted).

The Seventh Circuit so held primarily because of the Indiana Supreme Court's decision in *Shideler*, especially the fact that the *Shideler* Court "invoked as primary

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[1] *MacGregor v. State Mut. Life Assur. Co.*, 315 U.S. 280, 281 (1942); *see also Bishop v. Wood*, 426 U.S. 341, 346 n. 10 (1977).

support for its position and quoted at length" *Schmidt v. Merchants Dispatch Transport. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936), and *Schwartz v. Hayden Newport Chemical Corp.*, 188 N.E.2d 142 (N.Y. 1963), *amend. on other grounds*, 190 N.E.2d 253 (N.Y.), *cert. denied*, 374 U.S. 808. *Braswell, supra*, 723 F.2d at 533.

Schmidt held that where, as here, the alleged cause of plaintiff's injuries is a toxic (here asbestos) dust, "'the cause of action accrued when [plaintiff] inhaled the dust . . . not at the time the dust so inhaled resulted in a disease of the lungs, which date could only be determined by medical testimony.'" *Shideler, supra*, 417 N.E.2d at 289. That is what the Seventh Circuit held here. *Braswell, supra*, 723 F.2d at 533.

The *Shideler* Court held that,

> "[f]or a wrongful act to give rise to a cause of action and thus to commence the running of the statute of limitations, it is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred.' *Shideler, supra*, 417 N.E.2d at 289.

The Seventh Circuit's reading of Indiana law per *Shideler* is clearly correct. The Seventh Circuit thus correctly denied Petitioners' claim that *Monsanto* makes "susceptible of ascertainment" Indiana law. Indeed, the Court below correctly held that the Court of Appeals in *Monsanto* rejected the discovery rule. *Braswell, supra*, 723 F.2d at 532.

The sole issue in *Monsarto* was whether the trial court held erred in failing to grant defendant's Ind. Trial R. 12(B)(6) motion to dismiss, based on IC 33-1-1.5-5 and IC 34-1-2-1. *Monsanto, supra*, 455 N.E.2d at 394. The *Monsanto* Court held only that "a factual issue [existed as to accrual] which precluded the granting of such a motion." *Id.*, 455 N.E.2d at 398.

Here, in contrast, there is *no* factual issue as to when Petitioners' causes of action accrued. Their own doctor

testified that damage occurred when they inhaled Respondents' asbestos. See the September 20, 1982 Deposition Testimony of Anthony R. Dowell, M.D., at pp. 254-258, and 317, set forth at pp. A1-A5 of the Appendix hereof. Under *Shideler*, Petitioners' causes of action thus accrued when they inhaled the asbestos. *Id.*, 417 N.E.2d at 289. The two-year limitations periods then began to run. *Id.* There is *no* factual issue that this last occured in all cases more than two years before the filing of Petitioners' complaints. *Braswell, supra*, 723 F.2d at 528 n.1; Petit. 3-4. The Seventh Circuit thus correctly affirmed Respondents' summary judgments based on IC 34-1-2-2.

To support their contention that *Monsanto* contradicts *Shideler*, Petitioners quote from *Monsanto* as follows:

> "'It is not necessary that the extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred. *Shideler, supra.*'" Petit. 12, *quoting Monsanto, supra*, 455 N.E.2d at 394.

However, analysis of *Shideler* reveals that the *Monsanto* Court misquoted the Supreme Court by adding a requirement that "some" of the "damage" which "has occurred" be "ascertainable" whereas the Supreme Court only required that "damage" has occurred:

> "[I]t is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred," *Shideler, supra*, 417 N.E.2d at 289.

The *Monsanto* Court thus added "ascertainable" to modify the word "damage" in its citation to *Shideler*. *Shideler* contains no such qualification. The requirement is only that damage has occurred. There is no requirement that such damage be ascertainable.[2]

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[2] The Seventh Circuit was also correct in holding that *Monsanto* represents no departure from *Shideler* because the *Monsanto* Court itself cited *Schmidt v. Merchants Dispatch Transport Co., supra*. *Monsanto, supra*, 455 N.E.2d at 394. It was partly the *Shideler* Court's heavy reliance upon *Schmidt* and *Schwartz* that guided the Seventh Circuit. *Braswell, supra*, 723 F.2d at 533.

That the Supreme Court in *Shideler* did *not* intend to require that damage be ascertainable as a prerequisite to accrual is shown by the dialogue between the majority and the dissent in *Shideler*. *Shideler* involved an attorney malpractice action brought by a frustrated beneficiary against the attorney who drafted a will. A clause in that will which made a bequest to the plaintiff was eventually declared void by a probate court.

At issue in *Shideler* was whether the cause of action accrued at the time of the testator's death, when the will became irrevocable, or at the time of the probate court's declaration that the bequest was void. The *Shideler* majority held that plaintiff's cause of action accrued when the testator died. The dissenters would have held that the claim accrued when the probate court invalidated the pertinent will provision, largely because "[i]n the instant case, plaintiff could *not* have known that the particular clause in the will was ineffective until the court determined that it was void." *Shideler*, *supra*, 417 N.E.2d at 296 (emphasis added).

Thus, the *Shideler* majority *knew* that the damage which it held had there occurred was *not* then "ascertainable" but nonetheless decided that the occurrence of such damage was sufficient for the cause of action to accrue.

The reason for that decision is clear enough. The *Shideler* Court was articulating a broad rule for when a cause of action accrues applicable not only to the facts of its case but to the wide variety of cases controlled by IC 34-1-2-2, IC 34-1-2-1 and the two-year portion of IC 33-1-1.5-5.

The *Shideler* Court was primarily concerned with Indiana's interest in "repose," i.e., "the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, [that] makes it desirable to terminate contingent liabilities at specific points in time." *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975); *see also Chase Securities Corp. v. Donaldson*, 325

U.S.304, 314 (1945). As to that policy, a potential defendant's equities are the same, and the policy is just as beneficial to society, regardless of whether or not a plaintiff knows of or even *could know* of his damage. *Shideler, supra*, 417 N.E.2d at 291.

That policy of repose is served well by an accrual rule that makes the time of accrual *certain*, as in the date of last exposure. It is inhibited by a rule that makes the time of accrual dependent on the vagaries of medical testimony, as in the date a disease becomes susceptible of ascertainment. *Neubauer v. Owens-Corning Fiberglas Corp.*, 686 F.2d 570, 574 n.2d (7th Cir. 1982); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1239-41 (6th Cir. 1980). Thus, the decisions in *Shideler* and in the courts below are compelled by the substantial Indiana interest in repose stated by the Indiana Supreme Court in *Shideler*.

III. Certification Inappropriate.

A. Certification Is Never Required.

Petitioners urge this Court to "require" lower federal courts to certify controlling questions of state law whenever possible. Petit. 4. However, this Court has held that it will make no such rule:

> "We do *not* suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory . . . . *Its use in a given case rests in the sound discretion of the federal court.*" *Lehman Brothers v. Schein*, 416 U.S. 386, 394-95 (1974) (emphasis supplied).

B. Certification Improper Where, As Here, State Law is Not Novel, Unsettled Or Distant.

In *Lehman Bros., supra*, "the first time [this Court] expressed its view as to the use of certification procedures by the federal courts," *id.*, 416 U.S. at 395 (Rehnquist, J., concurring), the Court articulated three circumstances which can justify certification:

> "Here resort to [certification] would seem particularly appropriate to view of [1] the novelty of the question and [2] the great unsettlement of Florida law, [3] Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves in this Court in matters of state law, as 'outsiders' lacking in the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers v. Schein, supra*, 416 U.S. at 391.

None of the three conditions for certification found to exist in *Lehman Bros.* here exist. Certification is therefore inappropriate.

1. **When A Cause of Action Accrues Under Indiana Law Is Not A Novel Question.**

The question of when a cause of action for personal injuries accrues for Indiana statutes of limitations purposes is hardly novel. The principal Indiana decision relied upon by the Seventh Circuit, *Shideler v. Dwyer, supra*, is simply the most recent answer of the Indiana Supreme Court to that question. But *Shideler* is not the only such answer. *Shideler* is only one of at least thirteen Indiana appellate cases so holding.[3]

This oft-repeated Indiana rule, i.e., that "[a] cause of action...accrues when the injurious action occurs although the plaintiff may not learn of the injurious act

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[3] *See Guy v. Schuldt*, 236 Ind. 101, 138 N.E.2d 891, 895 (1956); *Hinds v. McNair*, 235 Ind. 34, 129 N.E.2d 553, 560 (1955); *Jackson v. Jackson*, 149 Ind. 238, 243, 47 N.E. 963, 964 (1898); *Board of Commissioners of Wabash County v. Pearson*, 120 Ind. 426, 22 N.E. 134 (1889); *Monsanto Co. v. Miller, supra; Wojcik v. Almase*, 451 N.E.2d 336, 341-42 (Ind.App. 1983); *Carrow v. Streeter*, 410 N.E.2d 1369, 1373 (Ind. App. 1980); *Fourth v. Fourth*, 409 N.E.2d 641, 644 n.5. (Ind.App. 1980); *Cordial v. Grimm*, 346 N.E.2d 266, 273 (Ind.App. 1976); *Toth v. Lenk*, 330 N.E.2d 336, 338 (Ind.Appl. 1975); *Blank v. Comm. Hospital of Indianapolis, Inc.*, 143 Ind.App. 333, 240 N.E.2d 562, 564 (1968); *Merritt v. Economy Department Store*, 125 Ind.App. 560, 128 N.E.2d 279, 280 (1955).

until later", *Guy v. Schuldt, supra*, 138 N.E. at 895, has been recognized by at least one District Court applying Indiana Law. *See Tolen v. A.H. Robins Co., Inc.*, 570 F.Supp. 1146, 1949 (N.D.Ind. 1983). The Indiana accrual rule has also been applied in at least two prior Seventh Circuit cases applying Indiana law. *See Morgan v. Koch*, 419 F.2d 993, 997 (7th Cir. 1969); *Deer v. New York Central Railroad Co.*, 202 F.2d 625 (7th Cir. 1953).

2. **No Unsettlement in Indiana Law As To When a Cause of Action Accrues.**

Nor is there any "great unsettlement" of Indiana law as to when a cause of action for personal injuries accrues. The Indiana Supreme Court's result and reasoning in *Shideler*, especially when considered with that Court's reliance upon and quotation from *Schmidt* and *Schwartz*, clearly required the Seventh Circuit's decision herein.

The *Shideler* Court flatly rejected Petitioners' argument that "Indiana requires the damage to be ascertainable." Petit. 12. That the Supreme Court did so is apparent not only from the dialogue between the majority and the dissent in *Shideler* described above, but also from that Court's considered rejection of this Court's application of a discovery rule to a federal statute of limitations in *Urie v. Thompson*, 337 U.S. 163 (1949). *Shideler, supra*, 417 N.E. 2d at 291.

What could be less "unsettled" law for this asbestosis case than the *Shideler* Court's invocation, "as primary support for its position" (*Braswell, supra*, 723 F.2d at 533), *Schmidt v. Merchants Dispatch Transport. Co., supra*, which the *Shideler* Court itself read as holding (*Shideler, supra*, 417 N.E.2d at 289) "that the cause of action accrued when [plaintiff] inhaled the dust"? That is precisely what the Seventh Circuit held here. *Braswell, supra*, 723 F.2d at 532.

Petitioners suggest that the accrual of claims for "injuries caused by chemicals, drugs and other man-made

substances, which injuries and/or diseases are not manifested for years" (Petit. 10) has not been addressed by Indiana courts. However, the two New York cases invoked as "primary support" by the *Shideler* Court were just such "[t]oxic tort" cases.

Schmidt involved silicosis, a type of pneumoconiosis caused by the inhalation of coal dust. Asbestosis, which plaintiffs allegedly have, is a form of pneumoconiosis caused by inhalation of asbestos dust. Both diseases thus share some common characteristics, including a relatively long "latency period" between the inhalation of the "deleterious dust" and the manifestation of any disease symptoms. *E.g.*, H.C. HINSHAW & J.F. MURRAY, DISEASES OF THE CHEST, Ch. 28, 707-09, 712-30 (4th ed. 1980); 1. A.P. FISHMAN, PULMONARY DISEASES AND DISORDERS, Ch. 65, 754-64, 770-79 (1980).

Schwartz v. Heyden Newport Chemical Corp., *supra*, relied upon in *Shideler*, was also a "disease-related action" in which "the plaintiff was injected with a radio-opaque dye which resulted in carcinoma thirteen years later." *Braswell*, *supra*, 723 F.2d at 532. In *Schwartz*, plaintiff's claim for his cancer was held barred by New York's statute of limitations, the Court holding, as it had in *Schmidt*, that "the plaintiff's claim accrued when the wrong occurred," i.e, when the dye was injected.

The "occurrence" rule of *Schmidt* and *Schwartz* has led the New York Court of Appeals to reach the same result in two consolidated asbestosis cases as the Seventh Circuit reached here. *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297 (1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2226 (1982).

Thus, the cases at bar are nothing like *Elkins v. Moreno*, 435 U.S. 637 (1978), Petit. 5-6, or *Lehman Bros. v. Schein*, *supra*, because here the relevant State law is clear.

In *Lehman*, a New York district court dismissed consolidated shareholder derivative suits because it held

that plaintiffs' allegations that a corporate officer had breached his fiduciary duty to his corporate employer failed to state a claim under the controlling Florida law. The Second Circuit agreed with the District Court "that Florida law was controlling, [but] it found none that was decisive." *Id.*, 416 U.S. at 389.

The Second Circuit nonetheless reversed, holding that the Florida courts would go beyond not only existing Florida law but also beyond New York's rule of *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969), upon which the complaints were based, to find that a cause of action had been stated. However, *Diamond* established a doctrine that the Florida Supreme Court had not even adopted, let alone expanded. Such "unsettlement of [State] law" is clearly not the case here: the Indiana Supreme Court in *Shideler* (and numerous other cases) not only adopted an "occurrence" rule for when a cause of action accrues but clearly forecast how it would apply such a rule in a "toxic tort" case like this one by its heavy reliance upon *Schmidt* and *Schwartz*.

In *Elkins*, this Court certified a question of Maryland law to the Maryland Supreme Court to avoid unnecessarily deciding a federal constitutional question and also because "there are no controlling [Maryland] precedents...." *Elkins, supra*, 435 U.S. at 662. Moreover,

> "[n]o recent Maryland case [was] cited in the briefs [in this Court] or below. In addition, petitioner's counsel, an Assistant Attorney General of Mayland, stated at oral argument that there 'are no Maryland decisions one way or another.' [Tr. of Oral Arg.] at 10." *Elkins v. Moreno, supra*, 435 U.S. at 662 n.14.

This is clearly not the case here, as the Indiana Supreme Court's recent sanction of *Schmidt* in *Shideler* demonstrates.

Petitioners argue that Indiana law is unclear because the Indiana Supreme Court has not decided the accrual date of a cause of action *for asbestosis*. However, the absence of a

state supreme court decision involving precisely the same facts as are presented to the federal court does not warrant a finding by such federal court that the State law is "unsettled" or "unclear" where, as here, the State's applicable rule of law is itself clear.

In *Vinyard v. King*, 655 F.2d 1016 (10th Cir. 1981) (O'Connor, D.J.), the district court held that the controlling Oklahoma law was unclear as to whether plaintiff had a federally protected "property interest", and therefore abstained.[4] The Tenth Circuit reversed.

Stating that abstention is "premised" on an unsettled question of state law, then-Judge O'Connor rejected the proposition that Oklahoma case law gave "insufficient guidance" into Oklahoma law, stating that

> "...one cannot expect the courts to have considered each of the infinite factual situations that could possibly arise.* In short, the difficulty in determining whether plaintiff in the case before us has a property right in employment exists not because of an unclear *standard*,* but because the precise set of facts here posed has not been addressed by the Oklahoma Supreme Court. We do not in any way minimize how difficult it may be to apply the law to the facts, but abstention is inappropriate on this basis. Under such circumstances, the district court may not abdicate its duty to adjudicate the matter.***" *Id.*, 655 F.2d at 1019-20 (footnotes and citations omitted; emphasis added).

Vinyard is on point. Here, the "standard" is clear: a cause

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[4] Abstention in accordance with *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), is so closely akin to certification under applicable state law procedures that, aside from the relative convenience of certification, "there is no functional difference at the district court level between abstension and certification." 1A Moore, MOORE'S FEDERAL PRACTICE, ¶0.203[5], at 2150-51 (1983 revision). The same considerations which control the decision as to whether or not abstention is proper therefore apply to the decision of whether or not certification is appropriate. *Ibid.* at 2151.

of action accrues when the injurious action occurs, regardless of when the plaintiff learns that he has sustained damage as a result of that occurrence. That the Indiana Supreme Court has not applied that clear legal "standard" to "the precise set of facts" of an asbestosis case thus could not allow the District Court or the Seventh Circuit "to abdicate its duty to adjudicate the matter." *See also Meredith v. City of Winter Haven*, 320 U.S. 228, 236-37 (1943); 1A MOORE'S FEDERAL PRACTICE, *supra*, at 2151.

This is *especially* true where, as here, the *Shideler* Court unequivocally stated how that standard is to be applied to these facts by its approval of *Schmidt*, a case which *does* involve nearly the precise set of facts of the cases at bar. *See* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Doctrine*, 122 U.PA.L.REV. 1071 (1974).

Persuasive also is *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 (5th Cir. 1976), in which certification was held to be inappropriate because there, as here, the relevant state rule of law was clear despite the absence of a factually identical state supreme court case.

Thus, for certification to be proper, the underlying state law must be unsettled or unclear. *Shideler* makes it clear that Indiana law is neither. Petitioners are not entitled to certification merely because they dislike existing Indiana law. *Meredith v. Winter Haven*, *supra*, 320 U.S. at 234; *Cantwell v. University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977).

3. Indiana Law Is Not Distant to Judges Below.

A third circumstance justifying certification in *Lehman* was the distance between the federal courts involved (there the District Court for the Southern District of New York and the Second Circuit) and the state whose law controlled (there Florida) and the consequent "lack [of] the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers v. Schein*, *supra*, 416, U.S. at 95. Such is not here the case.

Here, the District Judge who initially decided the cases, the late Hon. Cale J. Holder, was appointed to the District Court for the Southern District of Indiana in 1954[5] and was on that bench continously to the time of his decisions in these cases in the fall of 1982. Such experience obviously gave Judge Holder substantial familiarity with Indiana law in general and with Indiana statutes of limitations in particular, as shown by his dialogue with counsel of record for Respondents at the Consolidated Pre-Trial Conference held on July 6, 1982. Appendix, pp. A6-A8.

Judge Holder was thus precisely the kind of District Judge who had a lot of experience with the relevant state law, and to whom this Court has for that reason consistently given great deference in the construction of such state's laws. *Bishop v. Wood*, *supra*, 426 U.S. at 346 n.10; *Huddleston v. Dwyer*, 322 U.S. 232, 236-37 (1944).

The Seventh Circuit has long included Indiana. The judges on the panel who decided this case have written numerous opinions requiring interpretation of Indiana law.[6]

C. Certification Inappropriate Because Petitioners Chose This Forum.

Plaintiffs commenced all of these actions in federal court. This fact weighs heavily against certification. *Cantwell v. University of Massachusetts*, *supra*, 551 F.2d at 880 ("[O]ne who chooses the federal courts in diversity cases is in a

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[5] JUDGES OF THE UNITED STATES, 514 (1978).

[6] As to Chief Judge Cummings, *see, e.g., Filler v. Rayex Corp.*, 435 F.2d 336, 337-38 (7th Cir. 1970); *Morgan v. Koch*, *supra*, 419 F.2d at 998-99 (7th Cir. 1969) (a case involving when a cause of action accrues); *Sims v. Lane*, 411 F.2d 661, 666 (7th Cir. 1969), *cert. den.* 396 U.S. 943 (1969). As to Judge Swygert, *see, e.g., Sparkman v. McFarlin*, 552 F.2d 172, 174-75 (7th Cir. 1977); *Long v. Anderson*, 536 F.2d 739, 740-42 (7th Cir. 1976). As to Judge Posner, *see, e.g., Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 967 (7th Cir. 1983); *Argonaut Ins. Co. v. Town of Cloverdale, Indiana*, 699 F.2d 147, 419-20 (7th Cir. 1983).

peculiarly poor position to seek certification. We do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort."); *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 192 n.5. (1st Cir. 1980); *Volkswagenwerk, A.G. v. Watson*, 390 N.E.2d 1082, 1085 (Ind.App. 1979) (Indiana "is reluctant to allow certification from a party who chooses to invoke federal jurisdiction....").

D. Certification Inappropriate Because Petitioners' Request Is So Late That Granting It Will Only Cause Unwarranted Delay.

Petitioners' first request for certification appeared in their "Appellants' Petition for Rehearing" to the Seventh Circuit, filed about December 23, 1983.

The first of these now-consolidated actions was filed in 1979. *Braswell, supra*, 723 F.2d at 528. Over four years later, the cases remain unresolved, even though the dispositive issue is ripe for decision. That alone is reason to refuse certification, as shown by this Court's reversal of the Fifth Circuit's abstention in *Meredith:*

> "To remit the parties to the state courts is to delay further the disposition of this litigation which has been pending for more than two years and which is now ready for decision." *Meredith, supra*, 320 U.S. at 237.

See also Wisconsin v. Constantineau, 400 U.S. 441 (1972) (Burger, C.J., dissenting); *State of Fla. ex rel. Shevin v. Exxon, supra*, 526 F.2d at 275-76 ("we must consider [in deciding whether certification is appropriate] an inevitable side effect of certification—delay....[D]elay that is not absolutely necessary should be avoided.")

E. Certification Will Not Avoid Federal Questions.

An important distinction between the instant cases and *Elkins v. Moreno, supra*, is that here no federal question will be avoided by certification.

The only federal issues asserted are whether the ten-year repose period in IC 33-1-1.5-5 violates Petitioners' Fourteenth Amendment due process and equal protection rights (Question Presented No. 3).[7] Such issues, *if* properly presented, are not dependent upon determination of when a cause of action accrues. Petit. 6. If the Court has jurisdiction of the Petition as to the constitutionality of IC 33-1-1.5-5, that issue remains regardless of when Petitioners' causes of action accrued.

Moreover, as the Seventh Circuit held, a holding which Petitioners have not challenged, "plaintiffs on appeal have not directly challenged the constitutionality of §34-1-2-2...." *Braswell, supra*, 723 F.2d at 529. Thus, no constitutional question will be avoided by the determination of when a cause of action accrues.

F. Indiana's Interest in Judicial Economy Weighs Heavily Against Certification.

Petitioners cite, as one reason for certification, "the interest of judicial economy...." Petit. i. But what of Indiana's judicial economy? Here, as shown above, certification is wholly unnecessary because the relevant State law is neither novel, unsettled nor distant. Certification is thus especially inappropriate since it "does increase the work loads of the state courts. Due regard [should be given] the interest of the states in conserving their judicial resources...." 1A MOORE'S FEDERAL PRACTICE, *supra*, at 2149-50.

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[7] The Petition for Certiorari is untimely as to the Fourteenth Amendment issues, as the Petition for Rehearing did *not* raise those issues. The Petition was not filed within ninety (90) days of the entry of judgment by the Seventh Circuit, but instead was filed within ninety days of the Seventh Circuit's denial of the Petition for Rehearing. Thus, the Petition for Certiorari was untimely under 28 U.S.C. 2101(c) as to any constitutional issues.

IV. Petitioners' Fourteenth Amendment Due Process and Equal Protection Rights Are Not Violated by IC 33-1-1.5-5, Indiana's "Statute of Repose."

Petitioners argue that their Fourteenth Amendment due process and equal protection rights are violated by Indiana's "statute of repose," IC 33-1-1.5-5. Petit. 7. This argument is without merit.

A. This Court Has Refused To Hear Appeals Raising Identical Claims of Fourteenth Amendment Violations.

Petitioners acknowledge that the same Fourteenth Amendment challenges they make to IC 33-1-1.5-5 were unsuccessfully made by the plaintiff in *Pitts v. Unarco Industries, Inc.*, 712 F.2d 276 (7th Cir. 1983), *cert. denied*, Dkt. No. 83-594, ___ U.S. ___, 104 S.Ct. 509 (November 28, 1983). The Court will recall that Petitioner Pitts argued in her Petition for a Writ of Certiorari, filed October 6, 1983, that IC 33-1-1.5-5's ten-year limitations period violated her Fourteenth Amendment due process and equal protection rights.[8] Thus, the Petition for Certiorari in *Pitts* presented this Court with the same federal constitutional issues as does the Petition here. The *Pitts* Petition was denied on November 28, 1983. *Pitts, supra*, 104 S.Ct. 509. No reason for a different disposition of Petitioners' Petition exists.

Two (2) recent dismissals of appeals in asbestos cases demonstrate that review should be denied. In *Bunker v. National Gypsum Co.*, Dkt. No. 82-1243, ___ U.S. ___, 103 S.Ct. 1761 (1983), this Court held that

> "The appeal is dismissed for want of a substantial federal question." *Ibid*, 103 S.Ct. at 1762.

In *Bunker, supra*, plaintiff-appellant Bunker appealed from the Indiana Supreme Court's decision in *Bunker v. National Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982), which

[8] Counsel of record herein was counsel of record for Respondents in *Pitts, supra*, Dkt. No. 83-594.

reversed an earlier decision of the Indiana Court of Appeals, *Bunker v. National Gypsum Co.*, 426 N.E.2d 422 (Ind.App. 1981). The lower court in *Bunker* had held that IC 22-3-7-9(e) violated Bunkers' Fourteenth Amendment due process and equal protection rights. That statute of limitations provided that no compensation under the Indiana Workmen's Occupational Diseases Act would be paid for occupational diseases allegedly caused by the inhalation of asbestos unless the claim was filed "within three (3) years after the last day of the last exposure to" the asbestos. IC 22-3-7-9(e).

The Indiana Supreme Court held that:

> "We now find the statute of limitations provision of the Occupational Diseases Act to be constitutional in all respects." *Bunker v. National Gypsum Co., supra*, 441 N.E.2d at 14."

The Court will recall that appellant Bunker challenged the Indiana Supreme Court's decision on both federal due process and equal protection grounds, as Petitioners have here challenged IC 33-1-1.5-5 and as the Petitioner challenged IC 33-1-1.5-5 in *Pitts*.

The thrust of appellant Bunker's due process and equal protection challenges to IC 22-3-7-9(e) is identical to that of Petitioners' due process and equal protection challenges to IC 33-1-1.5-5 here and of Petitioner Pitts' challenges to IC 33-1-1.5-5 in *Pitts*. Their argument is that because "asbestos-related diseases have a prolonged latent period between exposure and manifestation,***" Petit. 9 (citations omitted), and because such period is assertedly "twenty to forty years", Petit. 9, the applicable limitations period [in IC 33-1-1.5-5, ten years; in IC 22-3-7-9(e), three years] violates federal due process because it prevents claimants with asbestos-related diseases from recovering damages when they "do not know of even their injury, let alone its cause or their rights, until long after the cutoff." Petit. 10. Such a statute of limitations allegedly violates federal

equal protection because "slow injuries and fast injuries are treated unequally." Petit. 8.

This Court rejected those contentions by dismissing the appeal in *Bunker* for want of a substantial federal question. Such a summary dismissal by this Court is a ruling on the merits in that it rejects the challenges to the *Bunker* decision presented by appellant Bunker in his statement of jurisdiction. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); *Chicago Sheraton Corp. v. Zaban*, 593 F.2d 808, 809 (7th Cir. 1979), *cert. denied*, 444 U.S. 911; *Ahern v. Murphy*, 457 F.3d 363, 364-65 (7th Cir. 1972).[9]

The second rejection of similar appeals by this Court in asbestos cases occurred in *Rosenberg v. Johns-Manville Sales Corp.*, Dkt. No. 81-1614, ___ U.S. ___, 102 S.Ct. 2226, (1982), and *Steinhardt v. Johns-Manville Corp.*, Dkt. No. 81-1615, ___ U.S. ___, 102 S.Ct. 2226 (1982).

In *Steinhardt* and *Rosenberg*, the New York Court of Appeals affirmed summary judgments granted defendant asbestos manufacturers based on the New York statute of limitations which, under pre-existing New York case law there reaffirmed (i.e., *Schmidt* and *Schwartz*), was held to commence to run when the plaintiffs were last exposed. *Steinhardt v. Johns-Manville Corp., supra.*

It is true that this Court "[t]reated the papers whereon the appeals were taken as petitions for writ of certiorari", and then "denied" "certiorari" in *Rosenberg, supra*, 102 S.Ct. at 2226, and *Steinhardt, supra*, 102 S.Ct. at 2227, instead of dismissing the appeals "for want of a substantial

[9] This Court's dismissal of the appeal for want of a substantial federal question in *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870 (Tex. Cir.App. 1981), *app. dismissed*, ___ U.S. ___, 103 S.Ct. 24 (1982), *reh. den.*, ___ U.S. ___, 103 S.Ct. 478, is similarly significant. There the Texas architects and engineers' "statute or repose" was upheld against federal due process and equal protection challenges. An architects and engineers' statute of repose shares with a product liability statute of repose the same alleged violations of due process and equal protection, i.e., it can bar a plaintiff's claim for injuries before the plaintiff knows or can know he is injured.

federal question" as it did in *Bunker, supra*. It is also true that this Court simply denied Pitts' Petition for Writ of Certiorari. *Pitts v. Unarco Industries, Inc., supra*, 104 S.Ct. at 509. However, the result in all three cases is the same as in *Bunker*.

Each of the four decisions left intact a decision which held that the summary dismissal of an asbestosis claim did not violate the Fourteenth Amendment. Each such dismissal occurred because the claim was filed after expiration of the applicable State limitations period, even though each such limitations period was, by Petitioners' argument, shorter than the "prolonged latent period between initial exposure to asbestos and manifestation." Petit. 9.

Thus, the clear import of this Court's dismissal of the appeal in *Bunker*, and its denials of the petitions for certiorari in *Pitts*, *Rosenberg* and *Steinhardt*, is that certiorari should be here denied because the Seventh Circuit in *Braswell* did *not* decide a federal question contrary to any decisions of this Court.

B. **Fourteenth Amendment Does Not Require A Discovery Rule For Personal Injuries.**

Petitioners cite *United States v. Kubrick*, 444 U.S. 111 (1979), and *Urie v. Thompson, supra*. Petit. 10-11. Petitioners recognize that in neither case did this Court hold that the Fourteenth Amendment required a state tort statute of limitations to have a discovery rule. Instead, Petitioners argue that the discovery rule applied by this Court to the federal statutes of limitations in those cases should be "raised" by this Court to become a Fourteenth Amendment rule. Their argument is without merit.

It is clearly not now the law that the Fourteenth Amendment requires a discovery rule:

> "Nor is a discovery rule mandated apparently by various provisions of the federal Constitution. See *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008,

446 N.Y.S2d 244, 430 N.E.2d 1297 (Ct. App. 1981), ___ U.S. ___, 102 S.Ct. 226, 73 L.Ed.2d ___." *Neubauer v. Owens-Corning Fiberglas Corp.*, 686 F.2d 570, 575 n. 4 (7th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1233 (1983).

To change the law so as to require a discovery rule in every state tort statute of limitations as a matter of federal constitutional law would be contrary to proper concepts of federalism:

> "[T]he State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980).

If the Fourteenth Amendment requires a discovery rule—a rule that a plaintiff's personal injuries must be ascertained or ascertainable before his claim therefore can be barred as untimely—*many* states will have to rewrite many statutes which establish periods of "ultimate repose." Such statutes exist not only as to product liability claims but also as to claims for malpractice by architects, engineers and/or doctors. The concept of all such statutes is the same: a period of "ultimate repose" is established which begins to run from a date certain over which only the potential defendant has control, e.g., the date of delivery of the product to the initial user or consumer, the date of substantial completion of a building or the date of the doctor's last treatment. Any claim based upon an injury that occurred more than the number of years of the applicable repose period after that date certain is barred, regardless of when the injury occurs or whether the plaintiff knows or can know he is injured.

A large number of such state laws which have already withstood constitutional challenges would be invalidated

by a holding that the Fourteenth Amendment requires a discovery rule.[10]

Indiana has itself upheld IC 33-1-1.5-5 against a constitutional challenge based on IND. CONST., art. I, sec. 12, which is patterned after the Fourteenth Amendment's due process clause, *Dague v. Piper Aircraft Corporation*, 418 N.E.2d 207 (Ind. 1981), and against federal due process and equal protection challenges. *Scalf v. Berkel, Inc.*, 448 N.E.2d 1201 (Ind.App. 1983).

Similarly, IC 16-9.5-3-1, which provides that a medical malpractice claim must be filed within two years of the al-

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[10] Reported cases in which such architects' and engineers' special statutes of repose have been upheld against federal due process and equal protection challenges include an Indiana case, *Beecher v. White*, 447 N.E.2d 622 (Ind.App. 1983), as well as the following: *President and Directors of Georgetown College v. Madden*, 505 F.Supp. 557 (D.Md. 1980), *aff'd in part, dismissed in part*, 660 F.2d 91; *Adair v. Koppers Company of Inc.*, 541 F.Supp. 1120 (N.D.Ohio 1982); *Smith v. Allen-Bradley Company*, 371 F.Supp. 698 (W.D.Va. 1974); *Barnhouse v. City of Pinole*, 133 Cal.App.3d 171, 183 Cal.Rptr. 881 (1982); *Salinero v. Pon*, 124 Cal.App.3d 120, 177 Cal.Rptr. 204 (1981); *Yarbro v. Hilton Hotels Corporation*, Colo., 655 P.2d 822 (1982); *Twin Falls Clinic & Hospital Building Corporation v. Hammill*, 103 Idaho 19, 644 P.2d 341 (1982); *Burmaster v. Gravity Drainage District No. 2 of Parish of St. Charles*, La., 366 So.2d 1381 (1978); *Klein v. Catalano*, 386 Mass. 701, 437 N.E.2d 514 (1982); *O'Brien v. Hazelet & Erdal*, 410 Mich. 1, 299 N.W.2d 336 (1980); *Anderson v. Fred Wagner and Roy Anderson Jr., Incorporated*, Miss., 402 So.2d 320 (1981); *Reeves v. Ille Electric Company*, 170 Mont. 104 551 P.2d 647 (1976); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 662 (1972); *Howell v. Burk*, 90 N.M. 688, 568 P.2d 214 (1977), *cert. den.* (1977), 91 N.W. 3, 569 P.2d 413; *Lamb v. Wedgewood South Corporation*, 55 N.C.App. 686, 286 S.E.2d 876 (1982), *mod.*, 302 S.E.2d 868 (N.C. 1983); *Freezer Storage, Inc., v. Armstrong Cork Company*, 476 Pa. 270, 382 A.2d 715 (1978); *McMacken v. State*, S.D.320, N.W.2d 131, on rehearing, (1982) 325 N.W.2d 60 (1982); *Harmon v. Angus R. Jessup Associates, Inc.*, Tenn., 619 S.W.2d 522 (1981); *Ellerbe v. Otis Elevator Company*, *supra*; *Good v. Christensen*, Utah, 527 P.2d 223 (1974); *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash. 2d 528, 503 P.2d 108 (1972).

leged negligent act, regardless of the plaintiff's knowledge thereof, has been upheld against federal and Indiana due process and equal protection challenges. *Rohrbaugh v. Wagoner*, 413 N.E.2d 891 (Ind. 1980); *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d, 585 (Ind. 1980); *Nahmias v. Trustees of Indiana University*, 444 N.E.2d 1204 (Ind. 1983); *Carmichael v. Silbert*, 422 N.E.2d 1330 (Ind. 1981).

None of Petitioners' cases hold that the Fourteenth Amendment requires that a discovery rule be applied to a state tort statute of limitations.

To begin with, "low-level" or rational-basis judicial scrutiny is clearly the proper scope of judicial review of Petitioners' federal due process and equal protection challenges to IC 33-1-1.5-5. *American Pipe Const. Co. v. Utah*, 414 U.S. 538, 554 (1974); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83, 88 n.32 (1978); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

Because Petitioners' constitutional challenges invoke this low level review, many of their cases are irrelevant. *Leary v. United States*, 395 U.S. 6 (1969), Petit. 9, concerned a fundamental constitutional right—the right to fairness in a criminal proceeding—and the Court thus applied strict scrutiny rather than the traditional level of judicial review.

Petitioners' reliance on *Cleveland Board of Education of LaFleur*, 414 U.S. 632 (1974), Petit. 9, is likewise misplaced. The School Board rule there invalidated was gender-based and the level of judicial scrutiny applied was accordingly stricter than would here be proper. *See, e.g., Mississippi University for Women v. Hogan*, ___ U.S. ___, 102 S.Ct. 3331, 3332 (1982).

Vlandis v. Cline, 412 U.S. 441 (1973), Petit. 9, is also distinguishable because the scope of judicial review there applied is different than that which is here proper. The *Vlandis* invalidated a Connecticut statute because less restrictive alternatives were available, *id.*, 412 U.S. at 451,

and because the statute did not always effectively make the distinction it was designed to make. *Id.*, 412 U.S. at 448. Such reasoning is clearly antithetical to the principle here controlling, i.e., that IC 33-1-1.5-5's "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 421 (1961).

Petitioners also cite a case in which a tax law was invalidated as unconstitutional. However, *Schlesinger v. Wisconsin*, 270 U.S. 230, (1926), Petit. 9, is, in this respect, "'plainly not good law today . . .'" *Sakol v. Commissioner*, 574 F.2d 694, 698 n.10 (2d Cir. 1978) (citation omitted), *cert. denied*, 439 U.S. 859 (1979).

Moreover, *Schlesinger* is inapposite. There invalidated was a tax statute which conclusively presumed that all gifts made within specified periods of the date of death were made "in contemplation of death" and thus had to be included in the donor-decedent's estate for tax purposes. What made such statute arbitrary and capricious was its utter disregard of the donor's actual intent. *Schlesinger, supra*, 230 U.S. at 239. No such legislative capriciousness inheres in IC 33-1-1.5-5.

Nor does *Martinez v. California, supra*, Petit. 11, require a discovery rule. In *Martinez*, this Court affirmed the dismissal, based on the California Tort Claims Act's provision of absolute tort immunity for the State's parole decisions, of a wrongful death claim brought against the State of California by the heirs of a decedent killed by a parolee. The heirs alleged that the State's employees were negligent in deciding to parole the murderer. Plaintiffs argued that the California rule violated due process.

The *Martinez* Court disagreed, upholding the statute because it rationally achieved California's purpose, i.e., enhancement of the State's parole program by eliminating any possible "chilling effect" of potential tort liability on the State agents involved in the parole decision-making process. This Court so held even though the statute's bar

was absolute in that there was *no* right to bring any wrongful death, personal injury or property damage claim against the State of California for negligently paroling someone.

Thus, under *Martinez*, Federal equal protection is not offended by a state statute which creates even an absolute bar to even an entire class of potential tort plaintiffs—there the class of persons allegedly injured by a negligently paroled California State prisoner; here the class of persons allegedly injured by products sold over ten years before suit—so long as such a statute rationally achieves a legitimate state purpose. Nor is Federal due process offended where there "'is a rational relationship between the state's purpose and the statute.'" *Martinez, supra*, 444 U.S. at 282 (quoting and "accepting" the California Supreme Court's decision being reviewed). That is clearly the case here.

C. IC 33-1-1.5-5 Rationally Achieves Indiana's Interests In Repose and Reliance.

One legitimate purpose of IC 33-1-1.5-5 and other statutes of limitations is to effectuate the policy of "reliance", the goal of which is "to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.* * *" *Chase Securities Corp. v. Donaldson, supra*, U.S. at 314 (citation omitted).

The second proper purpose of a statute of limitations is to effectuate the policy of "repose", i.e., to protect a citizen from psychological and economic uncertainty: to provide a point in time when a citizen can "be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations." *Chase Securities Corp. v. Donaldson, supra*, 325 U.S. at 314.

Indiana's determination that a ten-year statute of repose effectuates Indiana's policies of reliance and repose is clearly rational.

A key principle of "rational-basis" limited review is that "a statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it." *McGowan v. Maryland, supra*, 366 U.S. at 421. An obvious corollary to this principle is that, in reviewing a state legislature's decision as to where to draw the line between claims deemed too old to be fairly entertained, in light of the legislative policies of reliance and repose, and those deemed not too old for those policy goals to be vitiated by their litigation, the reviewing court must judge the legislature's decision "in light of the *broad class* of cases to which it applies. ..." *Hargraves v. Brackett Stripping Machine Co.*, 317 F.Supp. 676, 683 (E.D.Tenn. 1970) (emphasis added).

The broad class of all product liability cases governed by IC 33-1-1.5-5 includes cases based not only on asbestos-containing products and asbestos, but product liability cases involving automobiles, airplanes and virtually every other type of "product" imaginable.

Common experience teaches that it does not take ten years between the first sale of one of such a broad class of products and the litigation over its alleged defectiveness for memories of how that product was manufactured to "have faded," for "witnesses" to its manufacture to "have died or disappeared", or for "evidence" of its production to have "been lost." *See Chase Securities Corp., supra.*

It is hardly unreasonable for persons or companies to be granted the right to "plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability" for one of the many possible types of allegedly defective products when over ten years have elapsed since the first sale of that product. *See Johnson v. Star Machinery Co.*, 530 P.2d 53, 56 (Ore. 1974).

Petitioners erect a straw man to tear down as a purported demonstration that the ten-year repose period in IC 33-1-1.5-5 violates federal due process and equal protection. They assert that the Indiana Legislature decided on a ten-

year repose period based on its assessment of what constitutes the useful life of products. Petit. 9. Petitioners then claim that the statute is irrational because "there is no basis for asserting, as the statute asserts in its application, that asbestos is rendered less toxic by the passage of time." Petit. 9. Petitioners contend that because asbestos has a useful life in excess of ten years, the statute is irrational as applied to asbestos.

Petitioners' argument fails first because their premise—that the aim of IC 33-1-1.5-5's ten-year repose period is to establish the useful life of a product—is sheer speculation, as they *admit*. Petit. 7. This Court need not so lightly infer a legislative purpose. This Court has repeatedly held that the "*obvious* purpose [of a statute of limitations] is to encourage the prompt presentation of claims, * * *" *United States v. Kubrick*, *supra*, 444 U.S. at 117 (citations omitted; emphasis added), thereby effectuating "the legislative twin goals of (a) repose and (b) reliance that stale claims will not be tolerated in view of loss of memories, witnesses, or evidence." *Pitts*, *supra*, 712 F.2d at 281.

That such "obvious purpose" of statutes of limitation generally is indeed the purpose of IC 33-1-1.5-5 is clear from the statute's very terms: the statute's aim is not to define the "useful life of a product", a phrase not used in the statute, but is rather to define as untimely and thus bar "any product liability action" not "commenced" "within ten (10) years after the delivery of the product to the initial user or consumer. . . ." IC 33-1-1.5-5. As shown above, there can be no doubt that the twin legislative goals of repose and reliance are rationally achieved by the legislative decision to define as untimely (and thus bar) any action filed over ten years after the product's first sale.

Moreover, even if the Legislature's purpose in choosing a ten-year repose period was to define the "useful life" of products, Petitioners do not show that choice to be unreasonable. The Legislature's choice of the number of years for the "repose period" cannot be examined only as it

applies to asbestos or other allegedly toxic chemicals, but must be judged "in light of *the broad class* of cases to which it applies. . . ." *Hargraves v. Brackett Stripping Machine Co., supra,* 317 F.Supp. at 683 (emphasis added).

No doubt there are some, perhaps many, products which can be and are used for more than ten years.[11] Conversely, there are undoubtedly some, perhaps many, products destined for the junkyard in less than ten years, thus minimizing, if not eliminating, any risk of injury to the consumer before the ten years has passed. Such an assessment is clearly one for the Legislature, based on "legislative facts". Petitioners cannot here show that it is irrational for the Indiana Legislature to decide that most of the "broad class" of products are not in use after ten years.

D. Any Classification Created By IC 33-1-1.5-5 Is Constitutionally Permissible.

Petitioners assert that IC 33-1-1.5-5 creates two classes of tort plaintiffs based upon whether the plaintiffs have "slow injuries or fast injuries." Petit. 8. However, Petitioner fails to show how this asserted "classification" violates Fourteenth Amendment equal protection.

Moreover, the authorities set forth in the immediately preceding section of this Argument, which demonstrate that IC 33-1-1.5 does not violate Fourteenth Amendment due process, apply just as forcefully to equal protection analysis. No suspect classification is present; therefore, low-level rational-basis scrutiny is proper. IC 33-1-1.5-5's classification of potential tort claims by the length of the time period separating commencement of suit and delivery of the product to the initial user is clearly rationally related to the Indiana interests in repose and reliance.

Petitioners' equal protection argument was effectively

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[11] Asbestos may be such a product; however, there is no evidence in this record that it is. Petitioners' claims that asbestos is a "fiber which never wears out" and that "toxic chemicals do not wear out" (Petit. 9) are not supported by the record.

refuted in *Dague v. Piper Aircraft Corp.*, 513 F.Supp. 19, 24-25 (N.D.Inc. 1980), *aff'd*, Case No. 79-C-293 (7th Cir. 1981). Plaintiff Dague had argued, as do Petitioners here, that IC 33-1-1.5-5 improperly established an unreasonable classification between consumers injured by older products and those injured by newer products. The District Court rejected Dague's argument, holding that the ten-year cutoff time is not "arbitrary or unreasonable" and "to the extent that...consumer of older products are unprotected, such classification [is] reasonable and rational." *Id.*; *see also Pitts v. Unarco Industries, Inc.*, *supra*, 712 F.2d at 280-81; *Scalf v. Berkel, Inc.*, *supra*, 448 N.E.2d at 1205-06.

V. No Conflict Exists Among State and Federal Courts As to Any Federal Question.

Petitioners cite state court cases in which they contend statutes similar to IC 33-1-1.5-5 have been held to violate Fourteenth Amendment equal protection and/or due process. Petit. 6-7. Petitioners apparently hope to thereby create a conflict between such decisions of "state court[s] of last resort" and decisions of two "federal court[s] of appeals," i.e., the Seventh Circuit's decisions in *Braswell* and *Pitts* which rejected just such constitutional challenges to IC 33-1-1.5-5, and the Sixth Circuit's decision in *Mathis v. Eli Lilly & Co.*, 719 F.2d 134 (6th Cir. 1983), which rejected such challenges to Tennessee's ten-year product liability "statute of repose" in a DES case.

However, careful analysis of Petitioners' cases shows that none of them decided the *federal* questions which were presented in *Pitts*, *Braswell*, and *Mathis*. Each state court in Petitioners' cases held only that its respective state's product liability "statute of repose" violated such *state's*

constitution.[12] Petitioners' cases thus did not even decide "federal question[s]". S.C. Rule 17.1(b). Thus, there is *no* conflict between the decisions of the "state court[s] of last resort" cited by Petitioner and the "federal court[s] of appeals" decisions in *Pitts*, *Braswell* and *Mathis*.

V. Conclusion and Prayer.

Based upon the foregoing, the Petition should be denied.

Respectfully submitted,

DOUGLAS B. KING, Esq.
909 Merchants Plaza, East Tower
Indianapolis, Indiana 46204
Respondents' Counsel of Record

[12] The Court in *Kennedy v. Cumberland Engineering Co., Inc.*, 471 A.2d 195, 197, 201 (R.I. 1984), based its decision solely on R.I. CONST., art. I, sec. 5, and expressly declined to consider the federal constitutional question. The *Kennedy* Court also relied on most of Petitioners' other cases, *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983); *Battila v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980), and *Overland Const. Co. v. Simmons*, 369 So.2d 572 (Fla. 1979); and *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996 (Ala. 1982), all of which the *Kennedy* Court recognized decided only State constitutional questions. *Kennedy*, *supra*, 471 A.2d at 200-01. Such Courts' own opinions demonstrate this: *Lankford*, *supra*, 416 So.2d at 999, 1004, relied on ALA. CONST., art. I, sec. 13; *Battila*, *supra*, 392 So. 2d at 874, and *Overland Const. Co.*, *supra*, 369 So.2d at 575, followed FLA. CONST., art. I, sec. 21; and *Heath*, *supra*, 464 A.2d at 291-92, 294-97, applied N.H. CONST., pt. I, arts. 14, 15. Petitioners acknowledge that their only other case, *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E.2d 188, 192 (1981), *modified and aff'd*, 306 N.C. 364, 293 S.E.2d 415 (1982), considered only N.C. CONST., art. I, sec. 18.

APPENDIX

APPENDIX

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2.	Cover Page and Pages 89-90 of Transcript of Consolidated Pre-Trial Conference of July 6, 1982, Vol. I	Pre-Trial Transcript, (All Cases)	6-8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ORVIL T. BRASWELL, et al.,	)	NO. IP 79-996-C
HELEN MARIE IGO, et al.,	)	NO. IP 81-363-C
ROBERT E. GODFREY, et al.,	)	NO. IP 81-722-C
OBERT F. MOORE, et al.,	)	NO. IP 81-369-C
OMER T. ROGERS, et al.,	)	NO. IP 81-306-C
JAMES T. CLAPP, et al.,	)	NO. IP 81-162-C
THOMAS MUNCY, et al.,	)	NO. IP 81-1103-C
	)	
Plaintiffs	)	
	)	
-vs-	)	
	)	
GAF CORPORATION, et al.,	)	
	)	
Defendants.	)	

The deposition upon oral examination of ANTHONY REED DOWELL, M.D., a witness produced and sworn before me, James E. Shirey, Notary Public in and for the County of Hamilton, State of Indiana, taken on the 20th day of September, 1982, commencing at 6:15 P.M., at the office of the deponent, 3885 Wheeling Avenue, Muncie, Indiana.

[254]

EXAMINATION

QUESTIONS BY MR. KING:

124 Q Doctor, my name is Douglas King. I am going to ask you a few questions. I take it your reading has informed you that asbestos naturally appears as a fibrous mineral. Is that true?

A That's true.

125 Q How does the asbestos, which is a fibrous mineral, how does that in your opinion hurt people?

A My understanding is that the asbestos fiber is a fibrogenic mineral. By that I mean it stimulates the cells of the lung to form collagen or connective tissue, which tends to scar the lung parenchyma and interfere with its function as a gas exchange unit.

126 Q How is this ingested in someone that will cause this reaction that you have described?

A The problem with asbestosis of the lung is that the particles have to be inhaled and have to be deposited within the lung parenchyma and have to reside there long enough in order to generate this fibrogenic response.

127 Q But it's inhaled generally in the form of what we laymen would call a dust; is it not?

[255]

A Yes.

128 Q Is this a dust, then, you would consider to be fibrogenic?

A Yes, the dust being, the asbestos fibers would be fibrogenic in the host when inhaled and lodged within the lung tissue.

129 Q Okay. So it's my understanding, then, once the dust gets in someone's lungs through inhalation, it starts off this chain reaction that produces in some people a fibrotic reaction?

A Yes. That's my understanding.

130 Q Is it your understanding, then, that this tissue reaction occurs when the dust is inhaled?

A The tissue reaction apparently occurs in

different stages. The initial event is the deposition of the fiber in the tracheobronchial tree and if the fiber is small enough, it can be lodged in upstream segments in the distal or peripheral parts of the lung and there may be engulfed by cells known as macrophages. And it is my understanding that this engulfment by the macrophages or the cells of the lung can occur very quickly after the deposition of the particle within the lung itself. Once the particle is

[256]

ingested by the macrophage, a series of cellular events can take place, resulting in recruitment of other cells, a breakdown of cells known as cytotoxicity and the liberation of other chemicals, which generate the cells to increase protein synthesis or chemical production to lead to the inflammatory response.

The development of fibrosis, which in my mind means the production of collagen connective tissue, takes perhaps several weeks at least to begin to develop and in most cases the development of fibrosis is a chronic type of result in inflammation, which we are talking in terms of weeks to months to years.

131 Q I believe yesterday you used the term, "insult", in connection with the dust being inhaled in the beginning of this reaction. Can you tell me what you mean by that?

A The concept of insult in my definition would be the elicitation of the inflammatory response the particle makes when it's originally deposited within the lung. The insult can be an invasion of an area of the lung, which normally should be maintained free and clear of such pollutants,

and the insult being then the deposition of this potentially harmful or toxic product, which then

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sends off a series of events leading to organ destruction or alteration.

132 Q And this insult then occurs when the dust containing the asbestos is inhaled?

A It's my understanding that the insult begins at the time the particle arrives in the tracheobronchial tree and at least some biochemical and cellular events are taking place at that particular point in time.

133 Q And the macrophage reaction that you described, it is theorized by some people that this is what develops into the fibrosis that you have described as asbestosis?

A Yes. Since the macrophage is the first cell to come in contact with the asbestos material, the ingestion of this material then sets off a series of reactions, which lead to the other cell recruitment and the generation of more inflammation.

134 Q You used the term, "toxic", I believe, in one of your last answers. What do you mean by that word "toxic"?

A I equate the term "toxic" with nocuous or harmful effect of the material on normal organ tissue.

135 Q And asbestos then has a toxic effect when inhaled as you have described it; is that your opinion?

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A In regard to its toxicity, I would say that the

major problem or manifestation of toxicity would be the chronic inflammation or the chronic fibrotic change as opposed to an acute toxicity, which one might see with the inhalation of chlorine gas or ammonia gas.

136 Q So if I understand you correctly, the toxic effect, that is, the harmful effect of the asbestos begins to occur when it's inhaled?

A In my opinion, it's a matter of semantics as to when the actual process of inflammation begins. But as a point in fact, I would say that *the series of events leading to the final production of pulmonary fibrosis has to begin at the time the particles are deposited and engulfed by the cells in the lung.* [emphasis added]

* * *

[317] QUESTIONS BY MR. KING:

287 Q Doctor, you answered several questions of mine and later on you answered several questions of Messrs. Young and Kellam. Am I correct in thinking that it is your testimony that while the symptoms of asbestosis have a latency period, the biological mechanism, which starts that disease process, actually begins at the inspiration of the asbestos particles? Is that correct?

A It's my opinion that depending on how one—

MR. DREW YOUNG: Answer that yes or no, will you? That's really important. We have been wanting to know that.

A Can you repeat the question again?

(Question No. 287 was read back by the Reporter.)

A Yes.

288 Q Thank you.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ORVIL T. BRASWELL, et al.	)	IP 79-996-C
WILLIAM M. BAKER, et al.	)	IP 81-71-C
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BOB MCGEE, et al.	)	IP 81-1092-C
HARRY ROSEBERRY, et al.	)	IP 81-1094-C
HUBERT MADDEN, et al.	)	IP 81-1099-C
THOMAS MUNCY, et al.	)	IP 81-1103-C
	)	
-v-	)	
	)	
JOHNS-MANVILLE SALES CORPORATION	)	
JOHNS-MANVILLE CORPORATION	)	
GAF CORPORATION	)	
RAYBESTOS-MANHATTAN, INC.	)	
THE FLINTKOTE CO.,	)	
THE CELOTEX CORPORATION	)	
ASBESTOS CORP. LIMITED	)	
BELL ASBESTOS MINES, LTD.	)	
CANADIAN JOHNS-MANVILLE CO., LTD.	)	
NATIONAL GYPSUM CO., INC.	)	
LAKE ASBESTOS OF QUEBEC, LTD.	)	
FLINTKOTE MINES, LTD.	)	

Before The
HON. CALE J. HOLDER

Vol. I

OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS AT THE PRETRIAL CONFERENCE

Indianapolis, Indiana
July 6, 1982

[89]

THE COURT:

And, as has been predicted in prior cases, the plaintiff's position about has to be, in the law of Indiana, that the accrual date is that date when the injury occurred, plus knowledge of damages. You agree?

MR. ANDREW YOUNG: Absolutely.

THE COURT: Do the defendants agree to that?

MR. JAMES ROCAP: Yes, sir.

MR. KING: No, your Yonor.

THE COURT: How's tha'?

MR. KING: No, your Honor.

THE COURT: You don't agree with that?

MR. KING: I don't agree that is when the cause of action accrued.

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THE COURT: When does it? When is the accrual date?

MR. KING: The date of the injury, regardless whether plaintiff knows the fact that he's been damaged.

THE COURT: I want you to take a look at a case that I got kicked in the rear on, partially.

What was the name of the fertilizer—Gahimer versus Virginia-Carolina [*Gahimer v. Virginia-Carolina Chemical Corp.*, 241 F.2d 836 (7th Cir. 1957]. The plaintiff was planting corn, and the fertilizer was bad. The

administratrix had the problem, and they noticed during the summer that corn was fading out in color, its leaves weren't maturing properly, had boils all over it—whatever it was, I forget now. It wasn't until September, at crop time or thereabouts, that they were able to tell they were going to be short a crop.

The Court said there has to be knowledge of damages.

You are not referring to that other case I had on drugs [*Withers v. Sterling Drug, Inc.*, 319 F. Supp. 878 (S.D. Ind. 1970)] where—

MR. KING: No, your Honor, I am not referring to that.

With all due respect, I am referring to the case of the Indiana Supreme Court that was decided, handed down after the Seventh Circuit decided Gaheimer [sic], Shideler versus Dwyer. In Shideler, the cause of action accrued when the injury occurs.

In the briefs supporting the motion for summary judgment which I have filed I treat that case as—